SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1940

No. 607

AMERICAN LUMBERMEN'S MUTUAL CASUALTY COMPANY OF ILLINOIS,

Petitioner,

vs.

ELIZABETH SUTCLIFFE, AS ADMINISTRATRIX DE BONIS NON OF THE GOODS, CHATTELS AND CREDITS WHICH WERE OF MARGARET SUTCLIFFE, DECEASED, GEORGE FUERST AND ELIZABETH SCHENCK.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT AND BRIEF IN SUPPORT THEREOF.

FREDERICK A. KECK,
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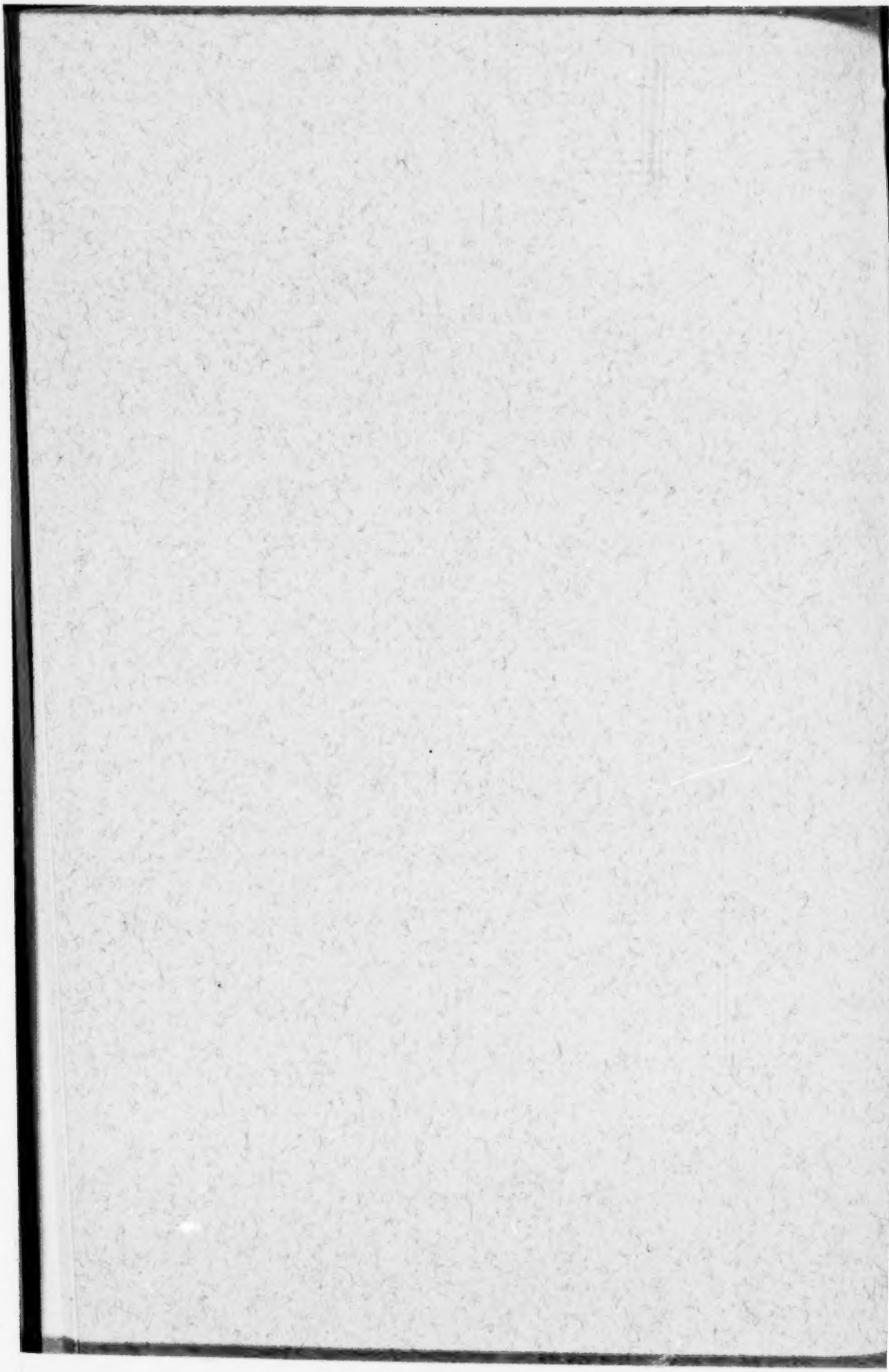
Of Counsel.



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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

To the Honorable the Supreme Court of the United States:

Your petitioner respectfully prays that a writ of certiorari be issued to review the decree (R. 122) of the United States Circuit Court of Appeals for the Second Circuit, made and filed on November 30, 1940, modifying a judgment of the United States District Court for the Eastern District of New York, rendered May 15, 1940 (R. 100), in an action brought by the above named respondents against the petitioner.

Opinions Below.

The opinion of the District Court (R. 87) is reported in 33 Fed. Supp. 130.

The opinion of the Circuit Court of Appeals has not yet been reported but is printed in the record (R. 115).

Jurisdiction.

The decision of the Circuit Court of Appeals was rendered November 12, 1940. The decree of modification was entered November 30, 1940. By direction of the Circuit Court of Appeals made December 2, 1940, the issuance of its mandate was stayed pending the consideration and decision of this petition for writ of certiorari, upon condition that there be filed with the Clerk of said Circuit Court, on or before December 9, 1940 of a certificate of the Clerk of this Court that this petition, the record and briefs have been filed.

The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code (28 U. S. C. A. Sec. 347).

Reasons Relied On for Allowance of the Writ.

The decision of the Circuit Court of Appeals is in conflict with applicable local decisions on important questions of local law,

(a) in that the Circuit Court of Appeals, in construing a generally used form of automobile liability insurance policy interpreted the extended coverage clause therein in aid of extending the amount of the coverage to persons actually mentioned by name in the policy, whereas, under the settled law of New York, the extended coverage clause extends the insurance to persons not actually mentioned by name in the policy and does not prohibit limitation of the amount of the coverage;

(b) in that the Circuit Court of Appeals, applied the rule of strict construction against petitioner insurance company in an action brought under Section 109 of the New York Insurance Law, by an injured person against the in-

surer of the person liable for the injuries, as if the right of action of such injured person were derived from the insurance policy, whereas, under the settled law in New York, the right of action of the injured person is derived from the statute, which is in derogation of the common law and must be strictly construed.

Summary of Matter Involved.

Respondents brought suit in the Supreme Court of the State of New York against Maxweld Corporation, and recovered judgments totaling $37,500, plus costs, as damages for injuries sustained in an automobile collision. Thereupon, respondents brought suit under Section 109 of the New York State Insurance Law (now Sec. 167) against the petitioner American Lumbermen's Mutual Casualty Company of Illinois on an automobile liability insurance policy issued by the petitioner.

Said section of the New York Insurance Law authorizes the injured person, if his judgment remains unpaid for thirty days, to bring suit against the insurance carrier "under the terms of the policy for the amount of such judgment not exceeding the amount of the policy."

This action, under the terms of the policy, was tried before the District Court of the United States for the Eastern District of New York, without a jury.

Both sides agreed that there was no ambiguity in the language of the policy (R. 33).

The District Court sustained petitioner's contention that the coverage limit of the policy was $10,000. (See opinion, R. 87; 33 Fed. Supp. 130.) Findings to that effect were made (R. 95), and judgment rendered accordingly (R. 100). On appeal by respondents the United States Circuit Court of Appeals for the Second Circuit modified the judgment of the District Court and sustained respondents' contention that the coverage limit of the policy was in excess of $10,000,

and awarded judgment for the full amount of the judgments recovered in the negligence action (R. 121).

Statement of Facts.

Earl C. Maxwell was the president of Maxweld Corporation (R. 65) which was engaged in manufacturing tanks in Brooklyn, N. Y. (R. 58).

In July, 1934, Maxwell bought a Buick Sedan which he paid for personally (R. 64, 65), and which was registered in his name and a New York State automobile license issued to him (R. 63).

Maxwell frequently used the car in the performance of his duties as president of the Maxweld Corporation (R. 65).

On the evening of December 4, 1934, Maxwell, accompanied by Patricia Sickles and Mae Cutter, drove to Northport, L. I. in the Buick car (R. 59). Upon returning about midnight, Maxwell's car, going west, collided with an automobile driven by George Fuerst, going east (R. 60). Fuerst was accompanied by Margaret Sutcliffe and Elizabeth Schenck (R. 60). All of the occupants of both cars were injured. Miss Sutcliffe died of her injuries and Maxwell died a few days after the accident (R. 60).

All of the injured persons and the administratrix of the deceased Miss Sutcliffe then brought suit against the Maxweld Corporation in the Supreme Court of the State of New York (R. 58), upon the claim of negligence on the part of Earl Maxwell, and recovered judgment (R. 60, 61). Upon return of unsatisfied executions, they brought this suit under Section 109 of the New York Insurance Law aforesaid, against the petitioner insurance company.

Meanwhile, Maxweld Corporation had appealed from the judgments in the negligence action, with the ultimate result that on November 21, 1939, the New York Court of Appeals affirmed the judgment in the negligence action in favor of Fuerst and his two companions but reversed the judgment

in favor of Patricia Sickles and Mae Cutter, who were riding in the automobile with Maxwell. New trials were granted to them because there was no evidence showing that these ladies, in accompanying Maxwell, did so in connection with the business of the Maxwell Corporation.

The New York Court of Appeals specifically said that the automobile "was registered in the name of the president and paid for by him but was used at times upon the business of the corporation" (R. 68).

Patricia Sickles and Mae Cutter then discontinued this action on the policy (R. 56). Fuerst and the other two plaintiffs went forward with this action.

Section 109 of the New York Insurance Law so far as pertinent and as it read up to 1935 (see N. Y. Laws of 1924, Chap. 639), provided as follows:

> "Sec. 109, Standard provisions for liability policies. No policy of insurance against loss or damage resulting from accident to or injury suffered by an employee or other person and for which the person insured is liable, * * * shall be issued or delivered in this state by any corporation or other insurer authorized to do business in this state, unless there shall be contained within such policy a provision that the insolvency or bankruptcy of the person insured shall not release the insurance carrier from the payment of damages for injury sustained or loss occasioned during the life of such policy, and stating that in case execution against the insured is returned unsatisfied in an action brought by the injured person, or his or her personal representative in case death results from the accident, because of such insolvency or bankruptcy, then an action may be maintained by the injured person, or his or her personal representative, against such corporation under the terms of the policy for the amount of the judgment in the said action not exceeding the amount of the policy. * * * No such policy shall be issued or delivered in this state on or after July first, nineteen hundred and twenty-four, to the

owner of a motor vehicle, by any corporation or other insure * authorized to do business in this state, unless there shall be contained within such policy a provision insuring such owner against liability for damages for death or injuries to person or property resulting from negligence in the operation of such motor vehicle, in the business of such owner or otherwise, by any person legally using or operating the same with the permission express or implied, of such owner.

"A policy issued in violation of this section shall, nevertheless, be held valid but be deemed to include the provisions required by this section, and when any provision in such policy or rider is in conflict with the provisions required to be contained by this section, the rights, duties and obligations of the insurer, the policy-holder and the injured person shall be governed by the provisions of this section."

The requirement of the first part of the aforesaid section constitutes what is known as the Financial Responsibility Clause. The latter part of the section provides for what is known as the Extended Coverage Clause.

Many States have statutes requiring insurance policies to contain either or both of such clauses either in identical or substantially similar language.

(See, as illustrations, Wisconsin Statutes, 204.31; 1929 Rev. Mo. Statutes Sections 5898, 5899; N. H. Laws 1927 Chap. 54; N. J. Laws 1931 p. 343; Vol. 1, 1911-1924 Suppl. Comp. St. of N. J. p. 1589; Ohio Gen. Code, 9510-3; Cal. Gen. Laws 3738.)

Insurance companies, desiring to use a single form of insurance policy conforming with the requirements of the various States, have consequently written their policies to include the aforesaid clauses in language designed to comply with the statutes of the various States, so that, in some instances, the clauses in the policy may include provisions not required in some of the States.

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* So in original. (Evidently should be "insurer".)

The policy in suit (Exh. 5, R. 71) was delivered in the State of New York (R. 73) and contained, among other provisions, the following two clauses which adequately complied with the New York statute in respect of extended coverage, to wit:

"EXTENDED COVERAGE—The terms and conditions of this Policy are so extended as to be available, in the same manner and under the same conditions as they are available to the Named Assured, to any person or persons while riding in or operating any of the automobiles described in the Special Conditions, and to any person, firm or corporation legally responsible for the operation thereof, provided such use or operation is with the permission of the Named Assured, or, if the Named Assured is an individual, with the permission of an adult member of the Named Assured's household other than a chauffeur or a domestic servant; provided, that no person, firm or corporation other than the Named Assured shall be covered hereunder if there be any other insurance which covers the loss of such other person, firm or corporation or which would cover if the insurance granted hereunder had not been effected. This Policy shall not cover the liability of an employee of any Assured, with respect to any action brought against said employee by another employee of the same Assured, on account of an accident arising out of the operation or use of the automobile in the business of such Assured. Any insurance under this Policy shall be applied first to the protection of the Named Assured and the remainder, if any, to the protection of any other Assured. This paragraph shall not operate to extend this Policy to cover the liability of a public automobile garage, automobile repair shop, automobile sales agency, automobile service station, automobile parking station, or the agents or employees thereof.

* * * * * * *

"ASSURED AND NAMED ASSURED DEFINED—The unqualified term 'Assured' wherever used in this Policy shall include in each instance the Named Assured and

any other person, firm or corporation entitled to coverage under the terms and conditions of this Policy, but the qualified term 'Named Assured' shall apply only to the Assured named and described in Special Condition 1."

The Questions Presented and Specification of Errors.

The Circuit Court of Appeals erred

(1) in construing the Extended Coverage clause in an automobile liability insurance policy issued under the New York Insurance Law, as if such clause may be considered as an aid in extending the amount of the coverage as to persons actually mentioned by name in the policy, whereas, under the local law of New York, such clause only extends the insurance to cover the negligence of persons not mentioned by name in the policy but operating the automobile with the permission of the owner. It does not prohibit limitation of the amount of the coverage;

(2) in applying the rule of strict construction against the insurance company in an action brought under Section 109 of the New York Insurance Law, by an injured person against the insurer of the person liable for the injuries, as if such right of action were derived from the insurance policy, whereas, under the settled law of New York, the right of action of the injured person is derived from the statute, which is in derogation of the common law and must be strictly construed.

WHEREFORE, your petitioner respectfully requests that a writ of certiorari be granted as prayed.

Dated December 3, 1940.

AMERICAN LUMBERMEN'S MUTUAL CASUALTY COMPANY OF ILLINOIS,

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